No. 82-973

# In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

*v.*

PREDRAG STEVIC

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF AMICUS CURIAE OF AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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# BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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## INTERESTS OF THE AMICUS CURIAE

The American Immigration Lawyers Association is a nonprofit association of lawyers practicing immigration and nationality law. The Association is supported by the dues paid by its members and is dedicated to the just administration of the immigration laws of the United States. The Association and its members are committed to the development of the jurispru-

dence of immigration law and believe that the views submitted herein while nevertheless in support of the alien's position would present a different view from that which might be advanced by either party.

INTRODUCTION AND SUMMARY OF ARGUMENT

In passing the Refugee Act of 1980 ("1980 Act"),[1] Congress directed that section 243(h) of the Immigration and Nationality Act[2] ("section 243(h)")[3] be applied in conformity with the United Nations Convention Relating to the Status of Refugees ("Convention").[4] Article 33, as

[1] Pub. L. No. 96-212, 94 Stat. 102, et seq.

[2] ("INA"), 8 U.S.C. §1101 et seq. (Supp. V).

[3] Section 243(h), 8 U.S.C. §1253(h)(1)(Supp. V), provides in pertinent part:

> "The Attorney General shall not deport or return any alien...to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."

[4] 189 U.N.T.S. 150 (July 28, 1951).

incorporated into the United Nations Protocol Relating to the Status of Refugees ("Protocol"),[5] refers to the term "refugees." That term, as defined in the Protocol, and in the 1980 Act, which tracks its language, relates to persons who have a "well-founded fear of persecution."

Before and after the 1980 Act, the standard of the Board of Immigration Appeals ("Board") for determining eligibility under section 243(h) has been "clear probability" of persecution. As this standard has meant a near certainty of persecution, it is significantly stricter than the "well-founded fear" standard of the Protocol.

In passing the 1980 Act and amending section 243(h), Congress intended to conform United States immigration law to the Protocol. Despite the somewhat inconclu-

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[5] 19 U.S.T. 6223 (January 31, 1967).

sive legislative history of the 1980 Act, it is beyond doubt that Congress was primarily concerned with conforming Section 243(h) to the substantive requirements of the Protocol. Moreover, Congress intended to merge the standard for 243(h) into the less stringent standard which had for years been applied to refugees under former INA section 203(a)(7) ("section 203(a)(7)").[6]

"Clear probability" is a far stricter standard than "well-founded fear," as interpreted by the United Nations High Commissioner for Refugees ("UNHCR") and by many Western signatories to the Protocol. The failure of the United States to adjust its standard to the Procotol in 1968 required passage of the 1980 Act. The decision below, therefore, correctly interpets Congress' intent to conform section 243(h) to the Protocol.

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[6] 8 U.S.C. §1153(a)(7).

## ARGUMENT

### IN PASSING THE 1980 ACT, THE UNITED STATES ADOPTED THE "WELL-FOUNDED FEAR" STANDARD OF THE PROTOCOL AND THEREBY CHANGED THE ADMINISTRATIVE STANDARD FOLLOWED BY THE BOARD.

### A. The Board's Administrative Standard Before and After The 1980 Act Has Been "Clear Probability" Of Persecution, Which Has Required A Near Certainty of Persecution.

#### 1. "Clear Probability" requires a near certainty of persecution.

Both before and after the 1980 Act, the Board's standard in determining eligibility for withholding of deportation has been a "clear probability" of persecution.[7] In applying the "clear probability" standard, the Board has required an

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[7] See, e.g., Marroquin-Manriquez v. INS, 699 F.2d 129, 133 (3d Cir.), petition for cert. pending, No. 82-1649 (filed April 7, 1983); Rejaie v. INS, 691 F.2d 139, 146-47 (3d Cir. 1982); Martineau v. INS, 556 F.2d 306, 307 (5th Cir. 1977); Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977); Cisternas-Estay v. INS, 531 F.2d 155, 159 (3d Cir. 1976); Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971); Matter of Martinez-Romero, Interim Dec. 2872 at 6 (June 30, 1981), aff'd, Martinez-Romero v. INS, 692 F.2d 595 (9th Cir. 1982); Matter of Rodriguez-Leon, A24-784-669 at 4 (BIA March 13, 1981); Matter of Mercade, A24-715-866 at 4 (BIA

alien to show to a near certainty that he would be persecuted on return to his country.

Under this stringent standard, persecution of virtually all members of a group to which the alien belongs does not constitute "clear probability" of persecution. Matter of Tan, 12 I. & N. Dec. 564 (BIA 1967). In Tan, the Board denied section 243(h) relief to a member of the Chinese ethnic minority in Indonesia, which had been facing severe attacks by the local populace. Despite evidence that the

July 14, 1981); Matter of Mendoza-Merino, A23 212-898 at 4 (BIA May 8, 1981); Matter of Haque, A36-260-428 at 4 (BIA February 5, 1981); Matter of Pang, A15-849-374 at 4 (BIA July 2, 1980); Matter of Maxime, A21-140-801 at 2 (BIA June 11, 1980); Matter of McMullen, 17 I. & N. Dec. 542 (BIA 1980), rev'd, McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981); Matter of Dunar, 14 I. & N. Dec. 310, 318-319, 322 (BIA 1973); Matter of Cha, A14-100-755 at 2 (BIA Dec. 10, 1971); Matter of Cuslac, A19-050-883 at 2 (BIA April 3, 1970); Matter of Bielecki, A13-836-799 at 4 (BIA May 1, 1970); Matter of Joseph, 13 I. & N. Dec. 70, 72-73 (BIA 1968); Matter of Tan, 12 I. & N. Dec. 564, 568 (BIA 1967).

government sanctioned these attacks, the Board held this did not constitute "clear probability" of persecution.[8]

Even an alien's political activities for which he was targeted for execution, were held not to constitute "clear probability" of persecution in Matter of McMullen, 17 I. & N. Dec. 542 (BIA 1980), rev'd, McMullen v. INS, 648 F.2d 1312 (9th Cir. 1981). The alien produced newspaper and magazine articles reporting his defection from the Provisional Irish Republican Army ("PIRA"), background evidence on the PIRA's routine torture and execution of defectors, and the public record in extradition proceedings showing the political nature of his activism.

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[8] Tan produced New York Times articles reporting that the government banned Chinese language newspapers, closed Chinese language schools and created hostility toward the Chinese. The record also included a letter from a relative disclosing that Tan's father's bakery had been broken into during a violent anti-Chinese riot.

The Board denied section 243(h) relief. It held that the alien had not demonstrated "clear probability" of persecution as he had not shown that the Irish government could not control the PIRA, though it conceded that "the Irish government ha[d] not been able to wholly control this [PIRA] terrorism." 17 I. & N. Dec. at 546. The Ninth Circuit reversed, noting that the "clear probability" standard applied by the Board was virtually "impossible" to meet. 658 F.2d at 1319.

The near certainty of persecution required under the "clear probability" standard is also exemplified by Rosa v. INS, 440 F.2d 100 (1st Cir. 1971), where the Board and the First Circuit denied withholding to a Dominican police sergeant under the former Trujillo regime even though the present government would not be able

to protect him from mob violence.[9]

Indeed, the instant case demonstrates the irrational stringency of the "clear probability" standard. Respondent Stevic demonstrated that he has been an active member of Ravna-Gora, an emigre anti-communist organization in the United States. Stevic v. Sava, 678 F.2d 401, 403 (2d Cir. 1982). Mr. Stevic's father-in-law, although then a United States citizen, was imprisoned for three years, when he went to Yugoslavia for a visit, because of his membership in Ravna-Gora, and committed suicide on his release. Stevic produced an Amnesty International Report and statements from the Congressional Record

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9 In addition to his own testimony, he submitted an affidavit of the Dominican Republic's local Consul General, stating that on the alien's return, he would be imprisoned, his property would be confiscated, and the government could not control mob violence aimed at him. The Board and the First Circuit nevertheless held that this did not constitute a "clear probability" of persecution.

verifying that a "hostile propaganda" law providing criminal penalties, including the imprisonment of violators, is enforced by the Yugoslavian government against members of emigre anticommunist organizations. Petitioner's Brief before the Second Circuit at 1517. Moreover, Stevic, a Serbian, produced evidence showing that the Serbians were being driven from their homes by the Albanian majority in his home province. Id. at 19. The Board denied section 243(h) relief despite the strong showing of: persecution of members of a group to which Mr. Stevic belongs; persecution of members of his family; and political activities in the United States which would result in persecution on his return to Yugoslavia. It was thus effectively demanding a showing of persecution to a near certainty.

2. The Board has required a near certainty of persecution even when it purported to apply a "likelihood" or "well-founded fear" standard.

Even when it has used the terms "likelihood" and "well-founded fear" of persecution to describe the section 243(h) standard, the Board has required proof of persecution to a near certainty. Matter of Kojoory, 12 I. & N. Dec. 215 (BIA 1967); Kasravi v. INS, 400 F.2d 675 (9th Cir. 1968).[10]

[10] The Government argues that the standard for section 243(h) relief was "realistic likelihood" of persecution before the courts imposed the "clear probability" standard, citing Lena v. INS, 379 F. 2d 536, 538 (7th Cir. 1967) and Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968). Brief for the Petitioner ("Pet. Br.") at 25. In fact, the courts were simply using the term "clear probability" as an apt characterization of the Board's administrative practice. See Matter of Bugajski, No. A14-133-905 at 3 (BIA March 23, 1966) (characterizing standard as "strong probability"); Matter of Perez, 10 I. & N. Dec. 603, 606 (BIA 1964) (requiring alien to demonstrate "positive" and "conclusive" reasons why he would be persecuted.)

Although prior to Lena and Cheng Kai Fu, the Board did not consistently articulate the standard

In Kojoory, the alien was the president of an anti-Shah student organization while in the United States, an editor of its newspaper and the creator of a highly critical caricature of the Shah. A photograph of Kojoory demonstrating against the Shah was published in a number of newspapers, including The Los Angeles Times. Purporting to apply a "likelihood" standard, the Board refused to withhold his deportation, despite its conclusion that "[t]here is no doubt that respondent has been prominently involved in this [anti-Shah] movement and it seems likely that he is known as a participant by the government of Iran." 12 I. & N. Dec. 215, 217.

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it was applying, even when it used other terminology, such as "likelihood" of persecution, it was effectively applying a "clear probability" standard. This is shown by its denial of withholding of deportation under a "likelihood" standard in the cases discussed above where aliens presented compelling evidence that they would be persecuted.

Similarly, in Kasravi v. INS, 400 F.2d 675, 676-77 (9th Cir. 1968), the Board denied withholding of deportation under a "likelihood" standard where the alien's "vociferous and vehement" opposition to the Shah in the United States was made known to the Iranian government by virtue of the publicity he received.[11] See also Note, "The Right of Asylum Under United States Law," 80 Col. L. Rev. 1125, 1141-1142 (1980).

A transparent example of the near certainty test disguised as the "well-founded fear" standard is Matter of Francois, 15 I. & N. Dec. 534 (BIA 1975). There the alien's father was murdered when the Haitian dictator Duvalier came to power. Their home destroyed, the alien's family fled to the Bahamas. Some of those family members who later returned

[11] Compare Matter of Janus and Janek, 12 I. & N. Dec. 866 (BIA 1968) (Board granted section 243(h)

to Haiti were also killed. The Board held that the alien did not have a "well-founded fear" of persecution because he had not demonstrated why the Haitian government "might be interested in him at this time." Id. at 537.

The Government argues that because the Board and the courts have used the terms "clear probability," "likelihood," and "well-founded fear" of persecution to describe the standard for withholding of deportation, the three standards are synonomous. Pet. Br. at 30-32. According to the Government, all three require merely a realistic likelihood of persecution. In support of its contention, the Government asserts that section 243(h) relief will be granted if the alien shows: previous persecution of himself or his family; persecution of all or virtually all members of a group to which he belongs; or activities engaged in after he left his country

relief to alien first critical of communist homeland after entry to United States; See also Lewis, "Case for Asylum," The New York Times, Aug. 25, 1983, p. A23, col. 5.

which will result in persecution if he returns. Pet. Br. 23-24, 32 and n.32. In fact, as appears above, the Board has denied section 243(h) relief despite compelling evidence of these very factors. Regardless of the term used to describe the standard for eligibility for withholding of deportation, the Board has required an applicant for section 243(h) relief to demonstrate to a near certainty that he would be persecuted.

B. In Amending Section 243(h) In The 1980 Act, Congress Intended To Conform form That Section's Provisions To The Requirements Of The Protocol, Thereby Changing The Standard of Eligibility.

When Congress passed the 1980 Act, amending the existing provisions of the INA, it did so with the express purpose of conforming the United States statutory law to the relevant provisions of the Protocol.

This purpose was confirmed by the Conference Committee's adoption of the

House version of the amendment to section 243(h) "with the understanding that it is based directly upon the language of the Protocol and [the intention] that the provision be construed consistent with the Protocol," H. R. Rep. No. 781, 97th Cong., 2d Sess. 20 (1980), and more particularly Article 33 of the Convention incorporated therein.[12] Article 33 in turn refers to "refugees," a term defined in both the Protocol[13] and the INA[14] as persons who have a "well-founded fear of persecution."

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[12] See H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979):

> "Although this section [243(h)] has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention."
>
> * * *
>
> [T]he proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements."

[13] See Article I(2) of the Protocol and Article I of the Convention.

[14] See INA §101(a)(42), 8 U.S.C. §1101(a)(42) (Supp. V).

While conceding congressional intent to conform to the Protocol, the Government asserts that the 1980 Act was designed to maintain the existing standard for section 243(h) relief, arguing that our law already conformed to the requirements of the Protocol. In its view the substantial change in legislative language wrought by the new law was simply a symbol of the United States' commitment to its international obligations and nothing more. This reading of the amended section 243(h) puts an undue strain on its text and history.

The Government's position belittles the clearly expressed legislative intent to bring United States law into conformity with the Protocol. The Government points to statements made by executive branch officials during Senate consideration of our accession to the Protocol to support its assumption that the Senate did not intend to alter the substance of our

immigration laws by accession to the Protocol. See Pet. Br. at 26-27. These officials assured the Senate that no legislative amendments were necessary to meet our obligations under the Protocol, since the Attorney General had the necessary administrative authority to apply existing law in conformity with the Protocol.[15] Thus, what the Senate was led to understand was not that no changes at all were required by our accession, but rather that any changes that were required could be handled administratively. See, for example, Matter of Dunar, 14 I. & N. Dec. 310 (BIA 1973), where the Board observed that the Attorney General had, in the exercise of his administrative discretion, consistently withheld deportation where an alien met the administratively-determined "clear

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[15] See S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 6 (1968) (remarks of Laurence A. Dawson, Acting Deputy Director of the Office of Refugee and Migration Affairs of the United States Department of

probability of persecution" standard.

Moreover, the Government's references to the legislative history of the 1980 Act again point to statements made by representatives of the executive branch that the Protocol's requirements were already being satisfied under United States law.[16] These officials merely restated the position the Government has maintained in proceedings before the Board and in the courts before and after the enactment of the 1980 Act. While the relevant congressional committees acknowledged the Government's position, it is hardly clear that Congress was satisfied that the requirements of the Protocol had been, and were

State); S. Exec. Doc. K, 90th Cong., 2d Sess. VII (1968) (letter of the Secretary of State).

[16] The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 71 (1979) (remarks of David Martin, Office of the Legal Adviser, Department of State and of Doris Meissner, Deputy Associate Attorney General, Department of Justice).

being met. The modification of section 243(h), specifically to clarify the language and conform it to the Protocol, strongly suggests that Congress was troubled by its vulnerability as applied. In the face of continuing contention before the Board and in the courts,[17] and in the absence of a Supreme Court decision, Congress saw fit to recast the language of 243 (h) in accordance with the requirements of the Protocol. What it accomplished was presumably more than a cosmetic change.

Whatever else may be in doubt, it is clear that Congress significantly altered the language of our laws relating to refugees, not only by changing the language of section 243(h) to conform to the Protocol, but by adding a provision for asylum, as

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[17] See, e.g., Kashani v. INS, 547 F.2d 376 (7th Cir. 1977); Matter of Chumpitazi, 16 I. & N. Dec. 629 (BIA 1978); Matter of Dunar, 14 I. & N. Dec. 310 (BIA 1973).

well as a definition of refugee conforming almost precisely with that contained in the Protocol. Moreover, given the requirements of the Protocol, the 1980 Act should be construed so as to avoid conflict between this statute and our treaty obligations undertaken by accession to the Protocol. Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804).[18]

C. In Amending Section 243(h), Congress Adopted The Less Stringent Standard Applied By The Board Under Former Section 203(a)(7).

There is yet another basis for finding that Congress intended the 1980 Act to accomplish an easing of the "clear probability" standard in 243(h) cases. This relates to the relationship of the new legislation to an earlier provision under which the Board clearly applied a standard

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[18] See also United States v. White, 508 F.2d 453 (8th Cir. 1974); Sociedad Nacional de Marineroz de Honduras v. McCulloch, 201 F.Supp. 82, 89 (D.D.C. 1967), aff'd, 372 U.S. 10 (1967).

of eligibility far less demanding than "clear probability."

Under former section 203(a)(7), visa numbers were made available to aliens who fled communist or Middle Eastern countries because of fear of persecution. As the Second Circuit noted below, the standard of eligibility under that provision was less stringent than for withholding of deportation under section 243(h). Stevic v. Sava, 678 F.2d 401, 405, citing Matter of Ugricic, 14 I. & N. Dec. 384 (Dist. Dir. 1972) and Matter of Tan, 12 I. & N. Dec. 564 (BIA 1967).

In Ugricic, the Board held the section 203(a)(7) standard to be "good reason to fear persecution." 14 I. & N. Dec. at 385-386. In Tan, the Board rejected the "argument that an alien deportee is required to do no more than meet the standard under section 203(a)(7) of the Act when seeking relief under section

243(h)." Id. at 569-570.[19] Accord, Matter of Frisch, 12 I. & N. Dec. 40, 42 (Reg. Comm. 1967); Matter of Janus and Janek, 12 I. & N. Dec. 866, 875-76 (BIA 1968).[20]

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[19] The Government asserts that Matter of Tan is inapposite because it focused on the Attorney General's discretionary authority. Pet. Br. at 43-44. To the contrary, the Board's decision did not rely on the Attorney General's discretion, but on the difference between former section 203(a)(7)'s requirement that an alien demonstrate "fear of persecution" and section 243(h)'s requirement that he show that he "would be subject to persecution." The Board recognized that the latter was much stricter than the former.

[20] As section 203(a)(7) provided for conditional entry for an alien who both fled his homeland and was unable or unwilling to return because of fear of persecution, the Government makes the creative but baseless argument that the standard for unwillingness to return because of persecution is stricter than the standard for flight because of persecution. Pet. Br. at 43-44. As the cases above demonstrate, in all but the one case the Government cites, Ishak v. District Director, 432 F. Supp. 624 (N.D. Ill.1977), the Board has applied the same standard to an alien's flight from and unwillingness to return to his country. The district court in Ishak obviously did not understand the difference between refugee status under former section 203(a)(7) and withholding of deportation under section 243(h), as highlighted by its reliance solely on cases decided under section 243(h). 432 F. Supp. at 625.

Section 203(a)(7), then the only provision in the INA for refugees, was succeeded by section 207 of the 1980 Act, 8 U.S.C. §1157 (Supp. V). That provision, like the 1980 Act's asylum provision section 208, 8 U.S.C. §1158 (Supp. V), relies on the term "refugee," defined as one who has a "well-founded" fear of persecution." See INA §101(a)(42). Hence, as the Second Circuit stated, the 1980 Act "dictates that a uniform test of 'refugee' be applied to all aliens, whether seeking admission under the newly enacted section 207, or seeking to avoid deportation under section 243(h) ...." Stevic v. Sava, 678 F.2d 401, 408. Given the ameliorative purpose of the 1980 Act, Congress hardly could have intended the standard for refugee (or asylum) relief under the 1980 Act to be less generous than its predecessor.[21]

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[21] The Government contends that even if the standard under section 207 of the 1980 Act is more stringent

Indeed, Congress' broadening of the geographic scope of former section 203(a)(7) reveals its expansion of that standard. H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 1979.[22] As the Second Circuit wrote, "it would bring about wholly anomalous results to read the Act to impose a far more stringent legal test upon entry by refugees than existed in prior law." 678 F.2d at 408.

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than the standard for refugee status under former section 203(a)(7), that result is justified by the fact that only a minority of refugees who entered the United States prior to 1980 were conditional entrants under section 203(a)(7). Pet. Br. at 44-45. This argument is a non sequitur, as the number of refugees granted section 203(a)(7) relief is totally irrelevant to the standard applied for eligibility under that provision.

[22]The Government argues that Congress, in replacing former section 203(a)(7) with the Protocol's uniform definition of refugee, intended merely to eliminate that section's geographical restrictions, but did not intend to retain the less stringent standard for eligibility for refugee status. Pet. Br. at 45-46. That argument overlooks Congress' clear mandate to conform the 1980 Act's definition of refugee to that of the Protocol.

If the Court finds that the 1980 Act did not change the standard for section 243(h), it should limit its decision to that specific issue, on which certiorari was granted, and should refrain from deciding the standard for asylum under section 208. The Court might then wish to remand this case for a consideration of whether respondent Stevic would be eligible for asylum under section 208. Stevic applied for political asylum to the Chicago District Director in June 1979 under 8 C.F.R. §108, the precursor of the current asylum provision, section 208. While the record does not reflect that the application was renewed under the 1980 Act, there has been considerable confusion in reference to the term "asylum," often used interchangeably for "withholding."[23] See, e.g.

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23 The Government argues that the standards for asylum and withholding of deportation are the same, notwithstanding that asylum is discretionary and withholding of deportation is mandatory to eligible

Rejaie v. INS, 691 F.2d 139, 140-142 (3d Cir. 1982); Pierre v. United States, 547 F.2d 1281, 1289 (5th Cir. 1977), vacated and remanded on other grounds, 434 U.S. 962 (1977).[24]

applicants. Pet. Br. at 21, n.21. However, the cases that the Government cites confuse asylum and withholding of deportation. See Matter of Martinez-Romero, Interim Dec. No. 2872 (BIA 1981), aff'd, Martinez-Romero v. INS, 692 F.2d 595 (9th Cir. 1982); Matter of Lam, Interim Dec. No. 2857 at 45 (BIA 1981); Matter of McMullen, 17 I. & N. Dec. 542, 544 (BIA 1980), rev'd, McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981).

Moreover, as asylum is discretionary, it can be denied to applicants for any number of reasons, such as making entry on forged documents. Matter of Salim, Interim Dec. 2922 at 78 (BIA 1982). As the adjudicator can weigh other factors in deciding whether to grant asylum, a more relaxed standard of eligibility is appropriate. On the other hand, withholding of deportation is mandatory and must be granted to an eligible applicant regardless of negative factors which might weigh against him on an asylum adjudication.

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This relief would be consistent with the Board's broad remand powers. See, e.g., Matter of Martinez-Solis, 14 I. & N. Dec. 93 (BIA 1972); Finucane, "Procedure Before the Board of Immigration Appeals," 31 Interpreter Releases 30 (1954).

It would also be appropriate to remand this case for the determination and application of an evidentiary burden or proof consistent with the requirements of the Protocol and the 1980 Act. See, infra, page 35, n.34.

D. As Interpreted and Applied in International Practice, "Well-Founded Fear" Is A Less Stringent Standard Than "Clear Probability" As Applied By The Government.

The term "well-founded fear" in the 1980 Act is derived directly from the Protocol.[25] It is useful therefore to examine the development of that term in the Protocol and the antecedent Convention and to follow its application in international practice.

1. The 1951 Convention and its 1967 Protocol.

The Convention, adopted in 1951 as the first step in resolving refugee problems arising from World War II, defines a refugee as a person who:

> [a]s a result of events occuring before January 1, 1951, and owing to

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25 H.R. Rep. No. 781, 96th Cong., 2d Sess. 19 (1980).

> well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country....

Article I(A)(2)(emphasis added).

To extend coverage of the Convention to refugees suffering from events which occurred later than 1951, the General Assembly presented the Protocol for adoption. The Protocol, which entered into force on October 4, 1967, was drafted under the auspices of the United Nations High Commissioner for Refugees (hereinafter "the UNHCR").[26] The Protocol re-

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26 The Office of the United Nations High Commissioner for Refugees was established, pursuant to a decision of the General Assembly, in December 1950. The Office's Statute is annexed to G.A. Resolution 428(V)[December 14, 1950]. The Statute calls for the UNHCR to inter alia, provide international protection, under the auspices of the United Nations, to refugees falling within the competence of his Office.

adopted "well-founded fear" as the standard for determining refugee status, and incorporated by reference most of the other articles of the Convention, including Article 32 and 33. Article 32 prohibits the deportation of refugees lawfully within the territory of a party to the Protocol, while Article 33 enjoins State parties from returning a person who meets the refugee definition to a country where he may be persecuted, regardless of the lawfulness of his presence in the country of refuge. This Article corresponds directly to section 243(h) of the INA. See, supra, pages 2-3, 15-16.

2. "Well-Founded Fear" In International Practice is Less Stringent Than "Clear Probability."

To the extent that there is a doubt as to the meaning of this treaty term, it is appropriate to look to the interpretations and practice of the parties to the treaty, Pigeon River Improvement Slide &

Boom Co. v. Cox, 291 U.S. 138 (1934),[27] and the intention of those who actually drafted the term, Cook v. United States, 288 U.S. 102 (1933).[28] Under either of these tests, "well-founded fear" means good reason to fear, a standard significantly less stringent than "clear probability."

a. The interpretation of the Convention's drafters and the UNHCR.

Under the meaning given to "well-founded fear" by the drafters of the Convention, an applicant can qualify if he "can show a good reason why he fears persecution."[29] The drafters and signers of

[27] See also United States v. Decker, 600 F.2d 733, 739-40 (9th Cir.), cert. denied, 414 U.S. 855 (1979).

[28] See also Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 220 (S.D.N.Y. 1975), aff'd, 528 F.2d 31, 34 (2d Cir. 1975), cert. denied, 429 U.S. 890, reh'g denied, 429 U.S. 1124 (1977); Block v. Compaigne Nationale Air France, 386 F.2d 323, 336-7 (5th Cir. 1967), cert. denied, 392 U.S. 905(1968).

[29] Report of the Ad Hoc Committee on Statelessness

the Convention looked to the UNHCR to oversee the application of the Convention's terms.[30] The UNHCR, accordingly, has published the Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1979)("Handbook"), to assist parties to comply with their treaty obligations under the Convention and the Protocol. The Handbook is generally accepted as the authoritative interpretation of the Convention and Protocol. In-

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and Related Problems to the Economic and Social Council, U.N. Doc. E/AC.32/5, p. 39 (emphasis added). Note the similarity of the Committee's explanatory language -"good reason why he fears," --to the standard applied under former section 203(a)(7) in Matter of Ugricic, 14 I. & N. Dec. 384, 385-86 (Dist. Dir. 1972). The Government itself has recognized the difference between "good reason to fear" and "clear probability." See, supra, pages 22-23.

[30] The Convention's preamble specifically states: "Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the effective coordination of measures taken to deal with this problem will depend upon the cooperation of States with the High Commissioner..." Article 35 of the Convention provides in relevant part:

deed, since the passage of the 1980 Act the Board has repeatedly turned to the Handbook for guidance in determining whether an alien is entitled to treatment as a refugee under the Protocol and section 243(h).[31]

In defining "well-founded fear," the Handbook states:

> Since fear is subjective, the definition involves a subjective element in the person applying for refugee status us. Determination of refugee status will therefore primarily require an an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin.

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1. The Contracting States undertake to cooperate with the Office of United Nations High Commissioner for Refugees,...in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention. (emphasis added).

This Article appears, verbatim, in Article 2 of the Protocol.

[31] See Matter of Frentescu, Interim Dec. 2906 (BIA 1982); Matter of Rodriquez-Palma, 17 I. & N. Dec. 465 (BIA 1980); Matter of Giralt, A24-963-058 (BIA September 30, 1982); Matter of Piedra, A22-800-673 (BIA September 30, 1980).

Handbook, para. 37, p. 11 (emphasis added.)[32] Although an applicant for refugee status must present some objective evidence which validates his fear, he need not demonstrate that he will be persecuted in his country of origin or even that there is a clear probability of such persecution. Instead a potential refugee need only show that he has a fear of persecution which is reasonable in light of all relevant factors:

> [T]he applicant's fear should be considered to be well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.

Handbook, para. 42, pp. 12-13 (emphasis added).[33]

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[32]See also Handbook, para. 40, p.12: "An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions."

[33]One leading commentator has defined the appli-

The Board's requirement of "clear probability", i.e. a near certainty, of persecution goes well beyond the requirements envisaged by the drafters of the Convention and understood by the UNHCR.[34]

cant's burden in the following manner: "The real test is the assessment of the likelihood of the applicant's becoming a victim or persecution upon his return to his country of origin. If there is a real chance that he will suffer persecution, that is reason enough, and his fear is "well-founded." Grahl-Madsen, The Status of Refugees in International Law, Vol. I, p. 181 (1966) (emphasis added).

If the Board had applied the well-founded fear standard as defined by the UNHCR, it would undoubtedly have reached different results in many cases. See, e.g., Matter of McMullen, 17 I. & N. Dec. 542 (BIA 1980), rev'd, McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981); Matter of Francois, 15 I. & N. Dec. 534 (BIA 1975); Rosa v. INS, 440 F. 2d 100 (1st Cir. 1971). See supra, pages 7-9,13-14, for a discussion of the compelling facts of these cases.

34 The Handbook, in addition to elucidating the standard an applicant for refugee status must meet also addresses the question of the burden of proof. Recognizing that generally the burden of proof rests with the person making the claim, the UNHCR notes that in most cases an applicant will not be able to produce voluminous evidence in support of his claim and may be unable to corroborate important assertions. Handbook, para. 196, p.47. In such cases, an applicant who has made a good faith attempt to produce the evidence at his dis-

b. The practice of other states party to the Convention and Protocol.

The Board's interpretation of "well-founded fear" also is stricter than the standard applied generally by other parties to either the Convention or Protocol, including many Western nations that share the United States' basic commitment to the

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disposal should be given "the benefit of the doubt." Handbook, para. 203, p.48.

This approach contrasts sharply with the burden of proof imposed by the Government. As set forth in Matter of Tan, 12 I. & N. Dec. 564 (BIA 1969), an alien must prove by a preponderance of the evidence that he faces a clear probability of persecution in his country of origin. Moreover, while the Handbook specifically validates grants of refugee status where all that is available to the decision maker is the applicant's own uncorroborated testimony, Handbook, para. 196, p. 47, courts in this country refuse to consider such testimony as sufficient. See, e.g., Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977); Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971). Thus, the Government and the courts are out of step with the UNHCR on both the meaning of "well-founded fear" and the proper burden of proof.

On the other hand, whereas in Matter of Tan, a formal distinction between the burden of proof and the standard of persecution was made, in most cases, the Board has failed to distinguish them. An examination of the Board's decisions in the instant case demonstrates this lack of distinction.

humane treatment of refugees.

For example, West German courts have consistenly concluded that an applicant for refugee status must show a good reason to fear persecution.[35] In 1962, the Federal Administrative Court of Berlin explained that:

> Good reasons for fear of persecution in the sense of the Convention exist if, taking a reasonable view of that case, it cannot be expected of the refugee that he remain in his homeland.[36]

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Accordingly, it would be appropriate for this Court to remand the instant case to the Board for the formulation and application of a burden of proof consistent with our obligations under the Protocol.

[35] See, e.g., Algerian Refugee Case, AV 10(1962/63) 24, Lauterpacht, 40 I.L.R. 230, 231. See also Matter of Urqricic, 14 I. & N. Dec. 384, 385-86 (Dist. Dir. 1972).

[36] Yugoslav Refugee Case, B Verw G I C 41.60, VGH Nr. 133 VIII 59 (1962), Lauterpacht, 40 I.L.R. 202 (emphasis supplied).

Indeed, German courts have characterized the test to be met by asylum claimants as one of only likelihood, rather than probability, of persecution.[37]

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37 For example, in a major case concerning a person's claim to refugee status arising after her departure from her country of origin, the Federal Supreme Court held that such a claim could be established where the applicant produced "evidence that his [sic] country is persecuting people of the same race, nationality or political opinion." Refugie Sur Place Case, Fontes Iuris Gentium, Series A, Sectio II, Tomus 6, 124; RZW 1966, 368, Lauterpacht, 57 I.L.R. 324. Significantly, the German Court did not require proof that virtually all members of the class of persons to which the applicant allegedly belongs are being persecuted.

Contrast this approach with the Government's position. Pet. Brief at 32. n.32. It states flatly that in the absence of proof that an alien would be singled out for persecution upon his return, the alien would have to show inter alia, "that all or virtually all of the members of a group to which he belonged had been persecuted...." See, e.g., Matter of Salama, 11 I. & N. Dec. 536 (BIA 1966). What the Government would require is a near certainty of persecution, a harsh standard never contemplated by the Protocol.

Canada, too, has adopted a refugee standard in accordance with the UNHCR Handbook.[38] Recent ministerial instructions and guidelines, issued to supplement the guidance of the Handbook provide:[39]

> A well-founded fear may be based on what has happened to others in similar circumstances. Where a person has not been persecuted simply because he has not yet come to the attention of the authorities, he need not wait until he has been detected and persecuted before he can claim refugee status. Nor need he be under the threat of imminent persecution.

Several states go even further in recognizing the UNHCR's primacy in interpre-

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38 1976 Immigration Act, S.C. 1976-77, Chap. 52, Article 2(1). See Maldonado v. Minister of Employment and Immigration, 31 N.R. 34 (1979) where the Federal Court of Appeals reversed the decision of the Immigration Appeals Board and remanded for consideration of whether the applicant had shown a "well-founded fear."

39 Minister of Employment and Immigration, New Refugee Status Advisory Guidelines on Refugee Definitions and Assessment of Credibility (February 20, 1982), para. 4, p. 2.

ting and applying the terms of the Convention and Protocol. Belgium, for example, delegates the responsibility of determining who is a refugee to the UNHCR's representative in Brussels.[40] The decision of the UNHCR is directly effective in Belgian law. Similarly, France accords the UNHCR's interpretation great weight by allowing his representative to be a voting member of the three-person appellate body reviewing refugee claims.[41]

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40 Ministerial Decree of February 22, 1954, Moniteur, April 15, 1954; Article 2 of the Law of February 27, 1969, Moniteur, May 3, 1969.

41 See Grahl-Madsen, op cit., at 345. The United Kingdom also recognizes the important role of the UNHCR in refugee determinations by allowing the UNHCR's representative to appear as a party in any appeal involving a determination of refugee status. See, e.g., Atibo v. Immigration Officer, [1978] Imm. A.R. 93; Secretary of State v. "Two Citizens of Chile," [1977] Imm. A.R. 36.

The United States appears to be alone among leading Western signatories to the Convention and Protocol in ignoring the interpretation of "well-founded fear" reflected in the Handbook. The "clear probability" test distorts the meaning of "well-founded fear" and violates both the letter and the spirit of the Protocol. Because of the limited nature of section 243(h) relief -- temporary withholding of deportation, rather than eligibility for permanent resident status -- and the possible life-threatening consequences of an erroneous decision, to use a test as stringent as "clear probability" is especially egregious.

## CONCLUSION

The judgment of the court of appeals should be affirmed and the case remanded to the Board for a reconsideration of respondent's application for withholding of

deportation under standards which comply with the requirements of the Protocol and the 1980 Act. Alternatively, this case should be remanded to allow respondent to process an application for asylum under section 208.

Respectfully submitted,

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